No. 22,670

In the

United States Court of Appeals

For the Ninth Circuit

LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, a labor organization,

Appellant,

vs.

PACIFIC MARITIME ASSOCIATION, a California nonprofit corporation, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, a labor organization,

Appellees.

Brief of Pacific Maritime Association and International Longshoremen's and Warehousemen's Union

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STATEMENT OF THE ISSUES

1. Whether Local 13 can attack an arbitrator's award on the basis of the federal Arbitration Act (9 U.S.C. § 1, et seq.) so that Local 13 has rights or remedies in addition to those provided by § 301 of Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185).

2. Whether Local 13 must plead and prove bad faith or breach of the duty of fair representation on the part of the exclusive bargaining representative, the ILWU, in order to be able to

attack in any way the arbitrator's award or the contract provisions here involved.

3. Whether, if the issue is one for the courts, the complaints against a longshoreman for causing illegal work stoppages while acting as a union business agent were arbitrable under the grievance-arbitration procedure of the Pacific Coast Longshore Agreement.

4. Whether the district court had jurisdiction to consider the claims that the Pacific Coast Longshore Agreement or certain arbitration awards constituted unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151, et seq.

5. Whether enforcement of an arbitration award revoking the contractual registration status of a longshoreman who repeatedly violated the contract is the enforcement of a money judgment against a union member within the meaning of § 301 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185).

6. Whether the arbitration award was a modification or was based on a modification of the Pacific Coast Longshore agreement in violation of that agreement or, if the issue is for the courts, in violation of § 8d of the National Labor Relations Act.

7. Whether there is any genuine issue as to any fact material to the allegations of the amended complaint.

8. Whether Local 13 has stated a claim upon which relief could be granted.

9. Whether the district court erred in finding untrue the conclusionary allegations in the amended complaint that were contrary to or unsupported by factual material adduced by Local 13.

10. Whether summary judgment affirming the arbitration award of Sam Kagel dated June 29, 1965 was proper.

STATEMENT OF THE CASE

In this appeal Local 13 seeks to set aside an arbitration award and the court judgment confirming and enforcing it. The award was the final action in the grievance-arbitration procedure of the

collective bargaining agreement between Pacific Maritime Association (hereinafter referred to as the "PMA") and the International Longshoremen's and Warehousemen's Union (hereinafter referred to as the "ILWU"). The arbitration award had the effect of discharging a longshoreman named Pete Velasquez from longshore work done by PMA member companies.

The permanent longshoremen employes of PMA members have their status as employes as a result of their "registration". These employes with the highest seniority are called fully registered (Class A) longshoremen. Velasquez became a fully registered (Class A) longshoreman in July of 1953. His registration status provided his right to work as a longshoreman and gave him the first preference in dispatch to work assignments (PCLA § 8.41)[1], in promotion to skilled jobs, in selecting the work he would do and in other work conditions. Registration status is also one of several prerequisites to receiving various fringe benefits (See e.g. PCLA § 7.1). He lost all of these contractual rights when he was deregistered. In short, he was then discharged or "fired" from his job as a PMA longshoreman.

The underlying facts here are the conduct of Pete Velasquez that led to his discharge from his job as a longshoreman and the actions in the grievance-arbitration procedure leading to that discharge, as provided in the arbitrator's award.

In October of 1964 Velasquez became a Local 13 official, having been elected as night business agent for longshoremen in Los Angeles-Long Beach harbor. The contract provides that a registered longshoreman can be granted a leave of absence for the period he is employed by the union (PCLA p. 113). During his two years in office, Velasquez caused a series of illegal work stoppages contrary to the terms of the agreement. He created

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1. The Pacific Coast Longshore Agreement, 1961-1966, is attached to the amended complaint as exhibit A (C.T. 68:1-4). In this brief the agreement will sometimes be referred to as the PCLA.

these strike actions in violation of the clause stating there would be none (PCLA § 11.1). He refused to follow the contract grievance procedure and violated the contract's provisions requiring the use of its grievance-arbitration procedure (PCLA § 11.31). He thus transgressed the contractual commitment to observe the Agreement in good faith without resort to gimmick or subterfuge (PCLA § 18). PMA filed grievances against Velasquez for this course of conduct.

At the end of his term as night business agent he returned from his leave of absence to active work as a longshoreman. He exercised his contractual right to work and his right to preference in dispatch to work as a fully registered longshoreman. He continued his course of conduct of deliberate repeated offenses in causing illegal work stoppages. PMA filed grievances against Velasquez for this conduct.

All of the grievances against Velasquez were processed under § 17 of the PCLA. These came to the Joint Coast Labor Relations Committee on March 23, 1965. The minutes of the Committee "in re P. Velasquez" state, in part,

> ". . . [T]he Employers contended that Mr. Velasquez, Reg. No. 31090, is guilty of repeated violations of Section 17 of the Pacific Coast Longshore Agreement (1961-1966), and solely under this Section 17, moved for his deregistration.
>
> "The Union members of the Committee voted 'no' and disagreement was reached." (C.T. 103-104)

The grievance-arbitration procedure was concluded by an arbitration award of Sam Kagel, rendered on June 29, 1965. The award referred to repeated contract violations by Velasquez, specifying violations of §§ 3.1362, 3.142, 11.13, 11.2, 11.21, 11.31, 15.1, 17.15, 17.71, 17.81, 17.82, 18.1 (C.T. 58-60). The award of the arbitrator states, in part (C.T. 60-61):

> "The Agreement is specific and clear as to the manner in which grievances are to be processed. And is specific in prohibiting illegal work stoppages.

"All longshoremen, while working as such, are required to observe all of the terms of the Agreement. Union officers, including stewards, are bound by an even higher standard of conduct than might, in some circumstances, be required of a working longshoreman. Officers and stewards have the affirmative duty to enforce the Agreements as written.

"Velasquez was at times a working longshoreman, a steward and a Union officer. He was familiar with the Agreement machinery to process grievances. He knew that illegal work stoppages were prohibited. Clearly the applicable provisions of the Agreements on these matters were repeatedly called to his attention. However, he persisted in a course of conduct for which no excuse can be accepted. Nor was any in fact offered."

The arbitrator discussed issues that had been presented to him in the arbitration, stating (C.T. 61-62):

"It is argued that deregistration is not in line with other penalties provided for in the Agreement for such offenses as pilferage, etc. However, the parties themselves agreed that deregistration was a proper penalty. Section 17.81 provides in part that 'Any employee who is guilty of deliberate bad conduct . . . through illegal stoppage of work . . . shall . . . for deliberate repeated offense [be] cancelled from registration.'

"For purposes of assessing a penalty this provision includes Union officers. They are employees only on leave when elected to Union office. They retain their rights under the Agreement. They also are bound by the obligations provided for in the Agreement to conduct themselves properly and not to cause illegal work stoppages.

"This was clearly the intent of the parties derived from Section 17 and the tenor of the entire Agreement. The parties did not intend that a working longshoreman was to be prohibited from indulging in bad conduct and causing illegal work stoppages while at the same time a Union officer had an immunity as to such prohibited conduct. Or that the Union officer could escape the penalty that could beset a working longshoreman for such prohibited conduct. The Union concedes this."

The arbitrator concluded his award in the following language (C.T. 62):

> ". . . Velasquez' course of conduct consisted of deliberate repeated offenses in causing illegal work stoppages. The penalty which the parties themselves wrote into the Agreement for such conduct is proper and appropriate in this case.
> "DECISION:
> "The Employers' motion to deregister Pete Velasquez, Reg. No. 31090, is granted and he shall be deregistered forthwith."

Local 13 attacked the award internally in the ILWU and in court.

Thereafter Local 13 instituted action that led to the holding of a conference of the longshore division of the ILWU on August 23, 24, 25, and 26, 1965 (C.T. 302:11-16). In attendance were delegates from 24 of the 25 longshore locals on the Pacific Coast (C.T. 300:21-301:14; 302: 17-19). Local 13's delegates included its president and Velasquez. At that conference Local 13 made a motion that the ILWU reject the Kagel award deregistering Velasquez. That motion was defeated (C.T. 302:20-21).

A few days later, on September 3, 1965, Local 13 filed in Superior Court in and for the County of Los Angeles a complaint against PMA and the ILWU that alleged substantially the same facts alleged in the amended complaint that was filed in the instant case (C.T. 302:22-25). The matter was removed to district court. An amended complaint and answering pleadings were filed.

The parties carried on extensive discovery and pretrial procedures. PMA propounded interrogatories to Local 13. Those interrogatories and the answers deal with every factual allegation of the amended complaint (C.T. 181-236). PMA directed requests for admissions to Local 13 (C.T. 161-179). Responses were made (C.T. 238-258). Local 13 filed contentions of law and facts (C.T.

145-154), PMA filed its memorandum of contentions of fact and law (C.T. 265-284) and ILWU filed its contentions of fact and law (C.T. 285-289). From these the parties prepared a pretrial conference order that contained statements of jurisdiction (C.T. 298-299), stipulations of certain facts (C.T. 299-304), a statement of contentions as to remaining issues of fact (C.T. 306-324) and a statement of remaining issues of law to be litigated (C.T. 325-328). Pretrial conferences were held in open court on September 19, 1966 (C.T. 158), December 19, 1966 (C.T. 180), March 20, 1967 (C.T. 290), April 17, 1967 (C.T. 451).

The pretrial order (C.T. 297-329) was agreed to by the parties and lodged on April 4, 1967. The matter had previously been set for trial for May 9, 1967 (C.T. 158). On April 6, 1967, defendants filed their motion to modify the pretrial order to limit the issues and their motion for summary judgment with their supporting memorandum. On April 13, 1967, Local 13 filed a voluminous memorandum of points and authorities in opposition to the motion for summary judgment (C.T. 351-392) together with five affidavits (C.T. 392-450). The matter came on for hearing on April 17, 1967. At that time Local 13 supplemented the 100 pages of material it had filed on April 13 by filing the reporters' transcripts of the arbitration hearings (Ex. 6A, 6B, 6C and 7 to Local 13's Memorandum, etc. C.T. 351-392). Its counsel argued at length in opposition to the motion for summary judgment (C.T. 451).[2] When Local 13's counsel had completed his presentation, the district court took the motion for summary judgment under submission and ordered the motion to modify the pretrial order off the calendar (C.T. 451).

The court ruled on April 25, 1967, that the summary judgment should be entered (C.T. 452-455). The court, in its subsequent opinion, summarized the steps taken before it reached this conclusion, stating:

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2. The reporter's transcript of this argument was designated but not reproduced (C.T. 697:1-3).

> "Both PMA and ILWU have moved for summary judgment after considerable pretrial discovery, a comprehensive pretrial conference order and voluminous contentions of law and fact have demonstrated that there is no genuine issue as to any material fact. The Court has reached the decision that the motion for summary judgment should be granted but it should be noted that this decision was reached only after the plaintiff exhausted numerous and extensive opportunities to show there were litigable issues of fact on this element of its claim." (C.T. 610:20-29)

Local 13 does not now claim that it was not afforded an opportunity to present all relevant factual material.

The court asked for a proposed decision, findings of fact, conclusions of law and a summary judgment (C.T. 454:28-32). The PMA and ILWU presented these.[3] Local 13 filed a 91 page response (C.T. 458-549). "The lower Court did not adopt or sign the findings of fact, conclusions of law or judgment submitted by defendant P.M.A. and prepared and filed on December 20, 1967, its own findings of fact, conclusions of law and judgment." (Op.Br. 26).

The district court filed detailed findings and conclusions.

The first seventeen findings of fact of the District Court are not attacked by Local 13. These findings succintly state the facts. They are set out below *in haec verba* (C.T. 572-577).

"– 1 –

PMA is a duly organized and existing California non-profit corporation having its principal place of business in Wilmington, California. PMA represents its member steamship, stevedoring and terminal companies for the purpose of negotiating and administering the collective bargaining contracts with the unions representing the stevedoring employees of its member companies.

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3. This document was designated but not reproduced (C.T. 695:28-29).

The companies represented by PMA are engaged in commerce, as defined by the Labor-Management Relations Act of 1947, as amended, 29 United States Code, Section 142.

"– 2 –

The ILWU is a duly organized and existing labor organization within the meaning of the Labor-Management Relations Act of 1947, as amended, 29 United States Code, Section 152. The ILWU was certified by the National Labor Relations Board on June 21, 1938, as the exclusive bargaining representative for longshoremen on the Pacific Coast. [See 7 N.L.R.B. 1002 (1938).] Moreover, it is the exclusive representative for collective bargaining purposes for employees performing longshore work for members of PMA along the Pacific Coast.

"– 3 –

Local 13 is one of the ILWU's longshore locals. Local 13 is also located in Wilmington, California, and its members are engaged in longshoring in the Los Angeles and Long Beach harbor areas.

"– 4 –

PMA and the ILWU have entered into a collective bargaining contract, entitled 'Pacific Coast Longshore Agreement, 1961-1966', governing the wages, hours, working conditions and disciplining of longshoremen employed by PMA members on the Pacific Coast. This agreement also binds Local 13 and its members.

"– 5 –

The contract contains a grievance procedure for the resolution of disputes. In the event that a dispute is not settled on the job or does not arise on the job, it then moves to a formal grievance procedure containing the following five steps: (1) a Joint Port Labor Relations Committee having jurisdiction over grievances and disputes arising in a single port; (2) a Joint Area Labor Relations Committee having jurisdiction over a wider geographi-

cal area; (3) arbitration before an Area Arbitrator who has jurisdiction over the same area as the Joint Area Committee and enjoys the additional power to pass upon its own jurisdiction; (4) a Joint Coast Labor Relations Committee having jurisdiction over the entire geographical area covered by the collective bargaining contract; and (5) arbitration before a Coast Arbitrator who, like the Area Arbitrator, has the power to pass upon his own jurisdiction.

"– 6 –

The contract establishes a group of employees, referred to as Class A longshoremen, who have a priority over other employees in obtaining available longshore work and in securing other benefits.

"– 7 –

Pete Velasquez was a Class A longshoreman from July, 1953 until July 29, 1965 in the Los Angeles-Long Beach Harbor. However, from October 1, 1962 until October 1, 1964, Velasquez served most of his time as a night business agent for Local 13. Velasquez worked primarily as a longshoreman again from October, 1964 until July, 1965.

"– 8 –

During the time Velasquez was a night business agent as well as during the latter part of 1964, various member companies of PMA had filed a dozen charges against Velasquez. On the basis of these twelve complaints, PMA moved to deregister Velasquez by taking the first step in the grievance procedure before the Joint Port Labor Relations Committee (Los Angeles-Long Beach) meeting in December, 1964 after Velasquez had been involved in a dispute on board the S.S. President Quezon.

"– 9 –

At the Joint Port Labor Relations Committee meeting, the parties were unable to resolve the issues involving Velasquez, and PMA accordingly referred the matter to the Joint Area Labor Relations Committee.

"– 10 –

The Velasquez grievances were considered but not resolved in the December 14, 1964 meeting of the Joint Area Labor Relations Committee, and the matter was referred to the Area Arbitrator by PMA.

"– 11 –

In accordance with the custom in the Los Angeles and Long Beach Harbor area, the employee and the local union were represented in the committee meetings and in the area arbitration by officials of Local 13.

"– 12 –

On January 4, 5, and 6, 1965, an arbitration hearing was held before Germain Bulcke, the Area Arbitrator for the Southern California area. Officials of Local 13 participated in that portion of the hearing during which evidence was presented relating to the alleged contract violations committed by Velasquez while he was working as a longshoreman after he had completed his term as night business agent. This portion of the hearing, involving the S.S. President Quezon and the S.S. Michigan, was concluded on January 5, 1965. The balance of the hearing, concerning the complaints against Velasquez for contract violations while he was a night business agent, was conducted and completed on January 6, 1965, but officials of Local 13 refused to participate in it.

"– 13 –

The Area Arbitrator ruled that the proceeding could continue ex parte under the terms of the contract, and this ruling was not challenged anywhere in the subsequent two formal steps of the grievance procedure.

"– 14 –

On February 13, 1965, Area Arbitrator Bulcke rendered a decision finding Velasquez guilty of ten of the twelve complaints filed against him, including the complaints concerning the S.S. President Quezon and the S.S. Michigan.

"– 15 –

Officials of Local 13 then referred the Velasquez grievance to the Joint Coast Labor Relations Committee, where the employee and union were represented by officials of the ILWU which is customary at this level of the grievance procedure. When the Committee considered the grievance on March 23, 1965, PMA and the ILWU were unable to agree on a resolution of the matter, and it was referred to the final step in the arbitration process, a hearing before Sam Kagel, the Coast Arbitrator.

"– 16 –

On April 28, 1965, a hearing was held before the Coast Arbitrator at which the employee and union were represented by officials of the ILWU. The ILWU spokesman took the position that, while a union official could be deregistered for repeated contract violations, deregistration was not warranted under the circumstances of this case. The Arbitrator rendered an award deregistering Velasquez on June 29, 1965 and ordered his name removed from the list of Class A longshoremen.

"– 17 –

For several years prior to the Velasquez matter, Germain Bulcke, as Area Arbitrator for the Southern California area, and Sam Kagel, as Coast Arbitrator, were the designated arbitrators who regularly heard grievances arising under this contract."

Finding 18, in contrast to the 17 findings just quoted as to which no claim of error is made (Op. Br. 27-33), gives rise to one of the principal grounds relied upon by Local 13 in attacking the judgment below. This finding reads (C.T. 616-618):

> "Local 13 has asserted that the ILWU acted arbitrarily, discriminatorily and in bad faith in processing the Velasquez grievance. More specifically, it contends that this conclusion is warranted on the basis of the following factual claims which the Court, taking all facts in the light most favorable to plaintiff and for the purpose of ruling upon the motion

for summary judgment, assumes to be and finds to be true:

* * *

"K. That the award manifestly disregards the collective bargaining agreement and the law."

Local 13 also attacks Finding 19, which reads (C.T. 618-619):

"The allegations contained in Local 13's amended complaint, to the extent that they are inconsistent with the Findings of Fact herein, are untrue."

The court reached detailed conclusions.

The summary judgment was based upon conclusions (C.T. 619-639), which the court stated it was making either as conclusions of law or findings of fact (C.T. 619:4-7). These are summarized as follows:

1. The court has jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (C.T. 619:11-14).

2. The award of the Coast Arbitrator and the actions taken through the grievance machinery "were and are in complete accordance with . . . [the applicable contract], particularly the terms governing the grievance-arbitration procedure".

"Each award and decision 'reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is'. *Humphrey v. Moore,* 375 U.S. 335, 351 (1964) relying upon *Drivers Union v. Riss & Co.,* 372 U.S. 517, 519 (1963)." (C.T. 619)

3. On the record before the lower court, Local 13 was obliged to establish that there was a breach of the duty of fair representation in order to establish a basis for relief in the federal courts with respect to the arbitrator's award.

"Nowhere in the record can we find any support for plaintiff's attack upon the integrity of the ILWU and of the procedures which led to the Coast Arbitrator's award and the Area Arbitrator's award. . . . Nowhere is there a factual statement, claim or allegation of fraud, deceitful action or dishonest conduct." (C.T. 623)

4. There is no breach of the duty of fair representation even when all of the factual contentions are accepted as true. This conclusion sets forth, in support, a detailed analysis of each of the factual contentions made by Local 13. (C.T. 624-638).

5. Local 13 is not entitled to any relief. The conclusion states:

> "There is no genuine issue as to any fact material to the amended complaint herein. The amended complaint and each and every cause of action therein alleged fails to state a claim upon which relief can be granted. Plaintiff is not entitled to any relief under or by virtue of the amended complaint and, in particular, is not entitled to any order or judgment setting aside or vacating the Coast Arbitrator's award dated June 29, 1965, or the Area Arbitrator's award"

6. PMA is entitled to a summary judgment confirming and enforcing the award.

SUMMARY OF FACTS

This case involves a Los Angeles longshoreman (Pete Velasquez), his exclusive representative for collective bargaining purposes (ILWU, which has been duly certified as such by the National Labor Relations Board), one of its longshore locals to which ILWU delegated certain of its duties in the administration of its collective bargaining agreement covering the longshoremen (here, Local 13), and the association of the employers of the longshoremen (PMA) with whom ILWU carries on collective bargaining and with whom it had a collective bargaining contract in effect during the period here relevant. The relevant provisions of that contract are in a document entitled Pacific Coast Longshore Agreement (PCLA). Under that contract an arbitration award was entered discharging Velasquez.

The conduct of Pete Velasquez that led to his discharge constitutes the subject matter of this appeal. During the period of his employment as a longshoreman by PMA, he was elected to and acted as an official of Local 13 in carrying on certain of the functions of ILWU that had been delegated to Local 13 and in turn

to him. In doing so he caused violations of the contract provisions that there shall be no work stoppages and that the grievance-arbitration procedure shall be "the exclusive remedy with respect to any disputes" and violations of the specific language stating, "Pending investigation and adjudication of such dispute work shall continue to be performed. . . ." This course of conduct was carried on in the face of contractual language providing, "As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge." In addition, after he had left his position as a Local 13 official, he caused and engaged in other illegal work stoppages in violation of the contract.

PMA filed grievances with respect to this conduct, asserting that he had violated the contract provisions and demanding his discharge therefor. PMA relied upon the contract provision that discharge was the proper discipline "for deliberate repeated offense" of the types here involved. These grievances were carried through the grievance-arbitration procedures. They ended with an arbitration award by Sam Kagel, permanent Coast Arbitrator. The arbitrator concluded, "Velasquez' course of conduct consisted of deliberate repeated offenses in causing illegal work stoppages. The penalty which the parties themselves wrote into the Agreement for such conduct was proper and appropriate in this case." Thereupon, he ordered that Pete Velasquez be discharged.

SUMMARY OF ARGUMENT

Local 13 has proceeded, on its own behalf and on behalf of Pete Velasquez, to attack the arbitration award. ILWU, as exclusive representative for collective bargaining purposes, has accepted the award as valid and has acted to enforce it. Accordingly there is no direct attack upon the award, but merely a

collateral attack being brought by and on behalf of those who are represented in these respects by the ILWU as their exclusive representative for collective bargaining purposes in accordance with the provisions of the National Labor Relations Act.

There is no merit in Local 13's argument that the negotiation and execution of § 17.81 of the PCLA were violations of the National Labor Relations Act. The claim is on the ground that § 17.81 provides, as the ILWU and the PMA and the arbitrator have said it provides, that a union official can be discharged for deliberately and repeatedly causing illegal work stoppages. Such a claim is within the exclusive jurisdiction of the National Labor Relations Board. The Board has held similar claims to be without merit. The act of negotiating a contract so providing cannot be successfully attacked in court. First, such a contract term is clearly within the "wide range of reasonableness" allowed the exclusive collective bargaining representative in negotiating a contract. Second, there are no factual allegations, which if proved, would establish a breach of the duty of "complete good faith and honesty of purpose" in negotiating the contract.

Local 13 erroneously asserts that the enforcement of § 17.81 through the arbitration award can be set aside. This claim is made on the ground that the deregistration called for by the award constitutes an unfair labor practice under the National Labor Relations Act. This contention, whether it be on the basis of the language in the arbitration act or on a bare claim of judicial power or on the basis of a claim that the National Labor Relations Act is a part of every contract, is without merit. The National Labor Relations Act gives exclusive jurisdiction to the Labor Board with respect to any claims that arguably assert that an unfair labor practice has been committed. Local 13 has shown no basis for an exception to the well recognized rule that precludes judicial enforcement of that statute, except only in the enforcement of Labor Board orders and in the issuance of injunctions on petition of the National Labor Relations Board.

Local 13 asserts that it may prosecute an attack on the award under 9 U.S.C. §§ 1-14, especially § 10(a), (b) and (d). Local 13 has no standing to do so because it is not a party to the collective bargaining contract under which the award was entered and because it and all of its members are bound by the actions of their duly certified exclusive representative for collective bargaining purposes. ILWU alone has power and authority under the law to act in this area. It alone can directly attack the award. In any event, there is no cause of action under 9 U.S.C. §§ 1-14 with regard to the award. A claim for relief in an attack on, or in a proceeding to confirm, an arbitration award under a collective bargaining contract derives solely from § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The substantive law involved is not that set forth in 9 U.S.C.; it is "the federal common law in this area of labor relations" that the courts formulate under § 301.

Local 13 can, and Velasquez individually could have, sought relief from the award through a collateral attack on it under § 301. Such an attack, however, can be made only if the moving party can show that there has been a breach of the duty of fair representation by the exclusive collective bargaining representative and can also show that there has been a violation of the collective bargaining contract involved. The district court entered a summary judgment holding that Local 13 had failed to assert factual claims that, if proven, would have established any breach of the duty of fair representation.

Under § 301, the courts may also confirm an award. PMA filed appropriate pleadings calling for a confirmation of the award of Sam Kagel. ILWU agreed that the award was lawful and proper in all respects and should be confirmed, but Local 13 has asked that confirmation and enforcement be denied. The district court entered a judgment confirming the award.

The summary judgment of the court below was correct in all respects. There was no need to litigate the factual issues. The

court below accepted as having been proved the evidence that Local 13 claims establishes the factual contentions on which it relies. Accepting these contentions as the facts, the court held that they would not establish a breach of the duty of fair representation and, accordingly, that there was no basis for setting aside the award. In turn it concluded that the award was to be confirmed and enforced, it being final and binding as stated in the contract.

ARGUMENT

I. The Arbitration Act does not give Local 13 additional rights beyond those it has under § 301 of the Labor Management Relations Act 1947, as amended (29 U.S.C. § 185).

Local 13 in its Point A argues that the district court erred in not holding that Local 13 was entitled as a matter of law to independent relief under the provisions of the Arbitration Act, 9 U.S.C. § 10. The basis for federal jurisdiction in this proceeding is § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Although Local 13 has not attacked Conclusion I of the court below (C.T. 580) and has not urged any additional basis for federal jurisdiction, it does assert that the substantive law applicable in a § 301 proceeding includes the law set forth in the federal Arbitration Act, 9 U.S.C. §§ 1, et seq.

a. This is a § 301 suit and the substantive law to be applied does not include the Arbitration Act.

The Supreme Court has ruled: "[T]he substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 at 456 (1957). The United States Arbitration Act is not part of that substantive law. In *General Electric Co. v. Local 205,* 353 U.S. 547 (1957) the Court stated:

> "The union brought suit in the District Court to compel arbitration of the grievance disputes. The District Court

> dismissed the bill, being of the view that the relief sought was barred by the Norris-LaGuardia Act. 129 F Supp 665. The Court of Appeals reversed, 233 F2d 85. It first held that the Norris-LaGuardia Act did not bar enforcement of the arbitration agreement. It then held that while § 301(a) of the Labor Management Relations Act of 1947 gave the District Court jurisdiction of the cause, it supplied no body of substantive law to enforce an arbitration agreement governing grievances. But it found such a basis in the United States Arbitration Act, which it held applicable to these collective bargaining agreements. . . ."

Local 13 quotes this language and then stops (Op. Br. 37). The Supreme Court, however, continues:

> "We affirm that judgment and remand the cause to the District Court. We follow in part a different path than the Court of Appeals, though we reach the same result. As indicated in our opinion in No. 211, Textile Workers Union of America v. Lincoln Mills of Alabama (US) supra, we think that § 301(a) furnishes a body of federal substantive law . . . [that is applicable]." (353 U.S. at 548).

The Supreme Court explicitly refused to base its action on the provisions of the Arbitration Act, 9 U.S.C. §§ 1-14. It held that the Arbitration Act was not the substantive law to be applied in § 301 suits for the enforcement or setting aside of an arbitration award. In such suits, it holds, the substantive law applicable is the same as is applicable in other cases under § 301. This is the federal common law in this area of labor relations. See *Dowd Box Co. v. Courtney,* 368 U.S. 502, at 507 and 514 (1962). It is this common law that the courts are to "fashion from the policy of our national labor laws". *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 at 456 (1957).

The federal Arbitration Act, 9 U.S.C. 1 et seq., was originally enacted in 1925. It was intended to apply to commercial disputes and not to "contracts of employment", § 1. Nevertheless, Local 13

relies on numerous cases applying the Arbitration Act to commercial disputes. One such case is *Wilko v. Swan,* 346 U.S. 427 (1953). These cases are not applicable to § 301 suits such as the instant case. In *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960), the Court said at p. 578:

> "Thus the run of arbitration cases, illustrated by Wilko v. Swan, 346 U.S. 427, [98 L.ed. 168, 74 S.Ct. 182,] becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." (363 U.S. 574 at 578.)

Other cases cited by Local 13 are not contrary to the foregoing. In *Metal Product Workers Union, Local 1645 v. The Torrington Company,* 358 F.2d 103 (2nd Cir. 1966) the court affirmed summary judgment in favor of the company enforcing an arbitration award. On appeal the union urged that the arbitration award must be vacated under § 10 of the United States Arbitration Act. The court did not hold that Act applied in § 301 suits. It stated "Even if § 10 were applicable, review of the grounds enumerated in the statute would not alter the result which we have reached." (358 F.2d 103 at 106)

The Arbitration Act does not state "the policy of our national labor laws" and so is not a direct source of this federal common law. It may, however, "provide a 'guiding analogy' ". See *Engineers Ass'n v. Sperry Gyroscope Co.,* 251 F.2d 133 (2nd Cir.,

1957). Local 13 must base its case upon the substantive law fashioned by the courts for § 301(a) suits. Provisions in the federal Arbitration Act may be viewed as a "guiding analogy" but in no event does that Act provide any rights beyond those provided under § 301. It can never call for a court decision that is at variance with the policy of our national labor laws.

b. The federal common law applicable in § 301 suits is in direct conflict with Local 13's claims as to the meaning of the Arbitration Act.

The major thrust of the federal labor policy is to permit employes the right to bargain collectively through representatives of their own choosing (29 U.S.C. § 157). To facilitate the exercise of that right the National Labor Relations Board is empowered to decide upon appropriate units of employes for the purpose of collective bargaining (29 U.S.C. § 159). A majority of employes within an appropriate unit may select by election, or otherwise, a representative for collective bargaining (29 U.S.C. § 159 subd. c). Congress has declared that for the purposes of collective bargaining the representative so selected shall be the exclusive representative of all employes in the unit (29 U.S.C. § 159 subd. a). In the instant case the ILWU is the exclusive bargaining representative. The Labor Board has expressly so certified the ILWU, 7 NLRB 1002 (1938).

The district court properly refused to fashion federal common law to sustain the contentions of Local 13 based on the Arbitration Act. By these contentions, Local 13 claims that it has the same rights to proceed to set aside the arbitration award as the exclusive bargaining representative. The policy of federal labor law establishes it does not. Local 13 and its members gave up individual rights in gaining the ILWU as their exclusive bargaining representative for collective bargaining purposes. See *J. I. Case v. Labor Board,* 321 U.S. 332, 338-339 (1944). The applicable

substantive law requires that ILWU be treated as this exclusive representative of Velasquez and of Local 13. This is true as to arbitration awards. "For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The claim that the Arbitration Act should be applied in violation of federal labor law policy is not to be sustained.

Local 13 indirectly argues that it is the exclusive bargaining representative. Local 13 in its brief states that it was before the trial court "as an adverse party to the arbitration conducted at the request of defendant P.M.A. and the only other party to such proceedings" (Op. br. 39-40, see also Op. br. 33, 38, 44). This statement is contrary to the uncontested facts found by the district court. The grievance moved through five steps of the grievance arbitration procedure contained in the agreement between the ILWU and PMA. In accordance with custom and practice in the Los Angeles-Long Beach Harbor area officials of Local 13 represented the union and the employe at the lower levels of the procedure. At the upper two levels including the final arbitration level the union was represented by officials of the ILWU (C.T. 615:19-21). There is no factual support for the conclusionary statement that Local 13 was the only other party to such proceedings. The contrary findings and the Labor Board's certification are binding; Local 13 acted only as a subagent of ILWU, the exclusive representative for bargaining purposes. Only the ILWU could have attacked the award directly.

Local 13 also urges this Court to hold that the Arbitration Act gives the district court jurisdiction to consider whether the deregistration of Velasquez was an unfair labor practice under § 8a of the Labor National Relations Act (29 U.S.C. § 158 subd. a). The argument is based on the provision of the Arbitration Act that empowers courts to vacate awards where the arbitrator ex-

ceeded his power (9 U.S.C. § 10 subd. d). This argument is without merit. Congress has given exclusive jurisdiction over claims of unfair labor practices to the Labor Board. (See part V, below.)

II. To prevail Local 13 must plead and prove bad faith on the part of the ILWU.

Local 13 in its Points B, G and K argues that the district court erred in holding that the awards are final and binding and that Local 13, in order to prevail, must plead and prove bad faith, dishonesty of purpose, or a hostile or invidious motivation on the part of the exclusive bargaining representative.

a. Local 13 in attacking the result of the grievance-arbitration procedure can be successful only if it shows hostile discrimination or invidious conduct on the part of the ILWU.

We have shown that Local 13 can not bring a direct attack on the award. A collateral attack on the result of the collective bargaining grievance-arbitration procedure can be successful only where it is shown that the exclusive bargaining representative exceeded its statutory power.

The ILWU as exclusive bargaining representative has negotiated a collective bargaining agreement covering all longshoremen on the Pacific Coast. The provisions of § 17 of that Contract are conceded by all to be part of the collective bargaining contract that applies to this controversy. Section 17.27 provides: "[T]he decision of the Coast Arbitrator shall be final and binding". Section 17.53 provides in part, "[T]he arbitrators shall have power to pass upon any and all objections to their jurisdiction."

1. The result reached in the grievance procedure is final and binding.

The instant case is an attempt by Local 13 to set aside the end result of the grievance procedure. It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not re-

view the merits of any controversy so decided. Particularly, the court will not rehear or reweigh the evidence offered at the arbitration hearing. Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator. These principles have been stated by the United States Supreme Court in *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960).

Local 13 has attempted to distinguish the three Steelworkers cases on the basis of factual differences between those cases and the instant cases. Such factual differences are unimportant. The significant holding of these cases states the role of grievance-arbitration procedures in collective bargaining contracts in furthering the federal labor policy of maintaining labor peace. Awards under such contracts, therefore, are normally enforced by the courts as a matter of routine, even where court action is instituted by the exclusive representative for collective bargaining.

2. Local 13 is required to show a breach of the duty of fair representation on the part of the ILWU.

The principal issue before the district court was the same as the one the Supreme Court confronted in *Humphrey v. Moore,* 375 U.S. 335 (1964). The Supreme Court held that a final decision in the grievance-arbitration procedure will not be set aside by a court in the absence of a showing that the decision was obtained by improper conduct of the union in breach of its duty of fair representation. Such a showing must be further supported by establishing a violation of the collective bargaining contract before any effective relief can be provided.

Humphrey v. Moore, supra, involved two companies ("E & L" and "Dealers") that had operated in the same geographic area.

They agreed to split the area between them and each agreed to retire from the other's now exclusive area and to this end, to transfer facilities back and forth. A dispute arose among the employes of the two employers as to who should be laid-off and who should continue to work.

The employes of both companies were represented by the same union and had similar or identical collective bargaining contracts. The contracts contained identical provisions regarding the employes' seniority rights. E & L was the older company, and its employes generally had greater seniority than those at Dealers; any dovetailing of the seniority lists would mean a displacement of many of Dealers' employes. Both contracts also included an identical clause, § 5, regarding the resolution of disputes arising out of mergers or absorptions. The grievance procedure was also the same in both collective bargaining contracts. It provided for referral first to a local joint union-employers committee and, next, to a Joint Conference Committee in Detroit. The decision of the Joint Conference Committee was to be binding unless it could not agree on a decision. In that event, the dispute was to be submitted to arbitration.

The seniority dispute was referred to the local committee. It did not settle it. It was then referred to the Joint Conference Committee, where it was decided that the seniority lists be dovetailed. Many of Dealers' employes (including plaintiff Moore) lost their jobs under this decision.

Moore, acting for himself and all others in his situation, filed a complaint in the Kentucky state court seeking an order retaining Dealers' employes in their jobs. *There were allegations of a hostile, false, deceitful, conniving, dishonest breach of the duty of fair representation in the conduct of the grievance procedure before the Joint Conference Committee.* Moore alleged that the local union president had told Dealers' employes that they had nothing to worry about and had thus lulled them into a false sense

of security. He contended that, as a result, they were denied the opportunity of making their contentions fully known to the Joint Conference Committee in its consideration of the grievance. He also alleged that the union president had purposely deadlocked the local committee in order to effect this discrimination against the Dealers' employes. There were further detailed allegations of "false and deceitful" action, of "connivance", and of "dishonest union conduct in breach of its duty of fair representation" in the Joint Conference Committee proceedings. There were allegations that the employes were deprived of a Joint Conference Committee hearing by the acts of the local union president (1) in espousing the cause of rival group within the union after having deceitfully connived against plaintiffs and (2) in deceiving the Dealers employes by indicating that the union would support their cause in the grievance procedure. There were allegations of a violation of § 5 of the contract. The pleadings asserted that the decision of the Joint Conference Committee, which changed plaintiffs' seniority standing so that they would be discharged, was the result of an incorrect interpretation and application of the collective bargaining contract in that § 5 precluded dovetailing of seniority in these circumstances.

The Kentucky trial court denied the injunction sought by Moore, but the Kentucky Court of Appeals reversed and granted it. It held, in effect, that the Joint Conference Committee violated § 5 of the contract when it decided the grievance by ordering dovetailing of seniority on the ground that the change in the operation of the companies was not a merger or absorption that would give the Joint Conference Committee jurisdiction under § 5. On this basis, it held the administrative decision modifying the Dealers seniority list to be in violation of the contract. Certiorari was granted.

The Supreme Court majority opinion holds that judicial relief could be granted *if* the Joint Conference Committee had erred in

changing seniority status so as to affect jobs, and *if* the change was arbitrary or capricious, and *if* the Joint Conference Committee procedure had been poisoned by the union's breach of its duty of representation in handling the seniority issue in the grievance proceeding at the Joint Conference Committee level. The Court held that Moore had sufficiently pleaded that his contract rights had been violated and had pleaded that this contract violation had occurred as a result of union activity in the administration of the grievance procedure that was *in breach of his right to and its duty of fair representation.* Therefore, the Court concluded, Moore had standing to sue, the court was not bound by the Joint Conference Committee decision if Moore established the breach of the duty of fair representation pleaded, and the court could itself then determine whether the jurisdictional fact under § 5 of a merger or absorption had been established.

Pete Velasquez and his agent Local 13 are required to show breach of the duty of fair representation by the ILWU in the operation of the grievance procedure just as Moore and his co-plaintiffs were required to show breach of the duty of fair representation on the part of their exclusive bargaining representative.

3. Local 13 has failed to adduce evidence to show breach of the duty of fair representation by the ILWU in the operation of the grievance procedure.

Much factual material is adduced by Local 13 in regard to its claim that the ILWU breached its duty of fair representation in the operation of the grievance procedure. This is the same material it claims shows that there was a violation of the ILWU's duty of "complete good faith and honesty of purpose". That material, even if true, would not establish a violation of the "duty of fair representation". A detailed discussion of those allegations is in part III of this brief.

b. Local 13 in attacking the PCLA can be successful only if it shows the ILWU acted outside its authority as collective bargaining representative.

Local 13 is attacking the collective bargaining contract.

Local 13 claims that § 17.81 of the Pacific Coast Longshore Agreement does not permit the revocation of the contract registration status of a longshoreman who repeatedly violates the contract while serving as a union business agent. It provides in part:

> "Any employee who is guilty of deliberate bad conduct in connection with his work as a longshoreman or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration."

Local 13's argument requires the premise that Velasquez was not an "employee" or a "longshoreman" within the meaning of this clause.

One issue discussed at the hearing before the Coast Arbitrator was whether § 17.81 should be interpreted to insulate the contractual registration status of persons while acting as union business agents so that they are free to engage in deliberate repeated violations of the contract under which they gained and hold their registration status. At that hearing the interests of the union and of the employe were represented by officials of the ILWU, the exclusive bargaining representative (C.T. 615:19-21). The ILWU agreed (see 31 and 46) that the registration status of business agents is not insulated and that § 17.81 does provide for the cancellation of the contractual registration status of a longshoreman who repeatedly violates the contract even while acting as a union business agent (C.T. 615:21-24). The Coast Arbitrator applied the contract provision in accordance with the expressed intent of the parties to that contract. Furthermore, if Local 13 could show *Humphrey* discrimination, it would be bound by the award. As the Supreme Court stated in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960):

> "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

If Local 13 is to succeed, it must attack the contract itself rather than the award.

Local 13 must show that the ILWU in agreeing to § 17.81 acted outside of its authority as exclusive bargaining representative.

The ILWU as exclusive bargaining representative has power to negotiate agreements for longshoremen in the bargaining unit. One who attacks that agreement must show that it was beyond the power of the ILWU to negotiate. The Supreme Court has defined the scope of the power of the exclusive bargaining representatives such as the ILWU to negotiate collective bargaining contracts. In *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953), the Court stated: "The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility." (345 U.S. at 339.) "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." (345 U.S. 337-338.) The power of the exclusive bargaining representative is not unlimited. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (345 U.S. at 338.)

Local 13 argues that it can attack the contract negotiated by the ILWU without being restricted by the limitations imposed by *Ford Motor Co., supra.* Local 13 asserts that those types of limitations apply only to individuals such as Huffman, plaintiff

there. That case was not decided on the basis of Huffman's status. The determinative factor was the status of the International as exclusive bargaining representative. In the present case the ILWU is the exclusive bargaining representative. Local 13 cannot show that ILWU exercised these powers improperly.

Section 17.81 is within the range of reasonableness.

Section 17.81 provides for deregistration for repeated illegal work stoppages, doing so as an integral element of a fundamental part of the contract. Thus § 11.1 provides:

> "11.1 There shall be no strike, lockout or work stoppage for the life of this Agreement.
>
> "11.2 The Union or the Employer, as the case may be, shall be required to secure observance of this Agreement.
>
> "11.3 How work shall be carried on.
>
> "11.31 In the event grievances or disputes arise on the job, all men and gangs shall continue to work as directed by the employer in accordance with the specific provisions of the Agreement or if the matter is not covered by the Agreement, work shall be continued as directed by the employer."

Further, § 17 provides an extensive grievance procedure for resolving all grievances and disputes. Included are special provisions for rapid interim resolution of disputes that arise on the job.

The Supreme Court has recognized the essential character of the grievance-arbitration procedure, stating: "The grievance procedure is . . . a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574 at 581 (1960). Engaging in a work stoppage rather than resorting to the grievance procedure is destructive of the collective bargaining process.

This fundamental principle was recognized by Harry Bridges, president of the ILWU. At the coast arbitration hearing he commented:

"Mr. Bridges: Well, I would like to say this much on what Ben just stated:

"One of the reasons, if not the main reason, that the motion to deregister is before the Arbitrator is because of the offenses as he said, 'against the total Contract, the total concept,' or 'the total principle of this Contract'.

"He has emphasized, and I think that is the guts of this case, that an officer of this Union, myself included, has a responsibility accepted under the language of the Contract, the 'good faith section', Section 18[4] and so forth, to follow the grievance machinery of the Contract and not resort to the extra-curricular means, such as under 17.15, to resolve grievances. In effect, the statement made by the Union today concedes that point." (Exh. 8 to Local 13 Memorandum etc., p. 31)

The preservation of the grievance procedure as part of the continuous collective bargaining process is a proper exercise of the power of the exclusive bargaining representative. The action of the ILWU in agreeing that a longshoreman who engaged in repeated illegal work stoppages rather than utilizing the contract grievance procedure could lose contractual registration rights preserves collective bargaining. A clause so providing is within the "range of reasonableness" in which the collective bargaining agent may lawfully act.

Local 13 has failed to adduce evidence to show bad faith or dishonesty of purpose in the negotiation of the PCLA and in particular § *17.81.*

The factual material adduced by Local 13 that it claims shows a violation of the ILWU's duty of "complete good faith and honesty of purpose" is the same material it claims shows the

4. Section 18 of the PCLA provides:
"As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge. The Employers give the same guarantee of good faith observance on their part."

ILWU breached its duty of fair representation in the operation of the grievance procedure. That material even if true would not establish a violation of the duty of "complete good faith and honesty of purpose". A detailed discussion of those allegations is in part III of this brief.

Local 13 has failed to establish its case attacking the terms of 17.81 on two grounds. It has failed to show that the clause, as interpreted by the arbitrator, the PMA and the ILWU, is beyond the range of reasonableness within which the exclusive collective bargaining agent may negotiate an agreement. Furthermore, it has failed to show any bad faith or dishonesty in the negotiation of this section.

III. The evidence adduced by Local 13 is insufficient to raise a material issue of fact regarding improper conduct by the ILWU.

Local 13 in its Points H, I, L and P claims that the district court erred in holding that the factual material adduced by Local 13 did not raise a material issue of fact regarding the bad faith or breach of the duty of fair representation by the ILWU in negotiating the collective bargaining agreement or in administering the grievance procedure. The litigants in the district court engaged in extensive discovery and other pretrial procedures. Local 13 was given extensive opportunity to adduce factual material[5] in support of its claims of what may be called "Humphrey" discrimination or lack of the *Huffman* "complete good faith and honesty of purpose". (See II, supra.)[6]

In its finding of fact 18 the district court found that for the purposes of the motion for summary judgment the various factual

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5. See pp. 6-8.

6. We shall hereafter use the terms "*Humphrey* discrimination" and "breach of the duty of fair representation" to refer to the types of improper union conduct that are discussed in *Humphrey v. Moore,* 375 U.S. 335 (1964), *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953), and *Vaca v. Sipes,* 386 U.S. 171 (1967). These are discussed at pages 24-27 and 29-30, supra.

contentions of Local 13 were true. The district court then concluded in its conclusion of law IV that those factual contentions, even if true, are, as a matter of law, insufficient to establish breach of the duty of fair representation on the part of the ILWU. The district court was correct in its findings and in its conclusions.

In its brief Local 13 does not assert that there are additional facts to show a breach of the duty of fair representation. The issue is whether the facts stated in Finding No. 18 show a breach of the duty of fair representation. The sub-parts of finding 18 are discussed below. We also refer the Court to the Appendix to this brief, in which portions of the district court's Conclusion IV (C.T. 624-636) are set forth. Analysis of the factual material presented by Local 13, even when it is viewed in the light most favorable to Local 13 by assuming it is true in all respects, shows that the district court did not commit prejudical error in its findings and conclusions.

A. The selection of the arbitrators shows no *Humphrey* discrimination. The arbitrators selected were of the type that the Supreme Court has stated is to be expected and is peculiarly helpful in solving the problems of industrial self-government in accordance with the policy of national labor law. See *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-582 (1960). The action below also accords with the Supreme Court's holdings that the courts are not to substitute their judgment of arbitrators for that of the contract parties. See *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960). In any event, the trial court's findings that the arbitrators are eminently qualified must be sustained. (C.T. 616, 625; App. 1-4)

B. The telephone conversation between Ward and Johnston about "Mickey Mouse" suggests no breach of the duty of fair representation. (C.T. 616, 627; App. 4)

C. The direct participation of Harry Bridges and Paul St. Sure in serious labor relations issues, whether or not coupled with

their reliance on subordinates in less serious issues, indicates no *Humphrey* discrimination. (C.T. 616, 628; App. 4-5)

D. The way PMA proceeded on these grievances and the opinion of Harry Bridges as to how Paul St. Sure carried on labor relations indicates only that PMA felt the issues were significant and that Bridges accurately evaluated the PMA position. This evidence shows acumen on the part of Bridges rather than hostility to Velasquez or Local 13. (C.T. 617, 629; App. 5-6)

E. The alleged conversation between Bulcke and Curt Johnston, in which the arbitrator asked Local 13 officials to live up to his decision as to his jurisdiction to hear all the grievances against Velasquez, shows only an effort to get Local 13 officials to proceed under the contract as it was obliged to do. (C.T. 617, 630; App. 6)

F. The statements of Bridges to Velasquez in April, 1965, show only the candor, the practical realism, the intuitive and knowledgeable judgment, and the sound advice to be expected of an outstanding leader of American labor. (C.T. 617, 631; App. 6-7)

G. The so-called "belly-packing" issue involved many more workers than did the Velasquez issue. (C.T. 203:14-15). If the ILWU determined that it should concentrate on a successful disposition of the "belly-packing" issue and if this meant less success on the Velaquez issue, the only inference to be drawn is that the ILWU attempted to suceed on one issue that was more important to the entire bargaining unit than the other. The district court properly found that in view of the large number of men involved in "belly-packing" ILWU made this decision honestly, in good faith and without any invidious, irrelevant or capricious action. These findings from the facts assumed to be true are clearly supported by them. (C.T. 618, 632; App. 7-8).

H. The statements attributed to the PMA manager that PMA had studied the Velasquez problem carefully and had acted after

such study merely confirms, as does much of the other factual material relied on by Local 13, that this case involved very serious contract violations by Pete Velasquez. (C.T. 618, 634; App. 9)

I. When ILWU acquiesced in the Kagel award, pursuant to action of its longshore caucus, it was "at worst" living up to its contract by acquiescing in a "bad award". The claim of Local 13 that it is flagrantly contrary to union principles to live up to the contract properly fell on deaf ears in the district court. The action of the ILWU reflects only the maturity in labor relations that is required by the policy of our federal labor law policy. (C.T. 618, 634; App. 9-10)

J. The conversation that allegedly took place between the arbitrators, regarding the discharge of Velasquez and his possible rehiring, is without relevance. The district court correctly so held. (C.T. 618, 635; App. 10)

K. The finding as to manifest disregard of the contract and the law, to which Local 13 repeatedly refers, is discussed in other parts of this brief. The "manifest disregard" of the unfair labor practice provisions of the National Labor Relations Act is discussed below at pages 37-38 and 38-43. Other claims of "manifest disregard" of the law and of the contract are discussed below at pages 36-38. (The district court's findings and conclusions are at C.T. 618, 636-638; App. 10-11.)

IV. Finding 18K is not in conflict with Conclusion II.

Local 13 argues that the district court erred, claiming that Conclusion II is in direct conflict with finding 18 K. An examination of the district court's decision shows that there is no conflict. Conclusion II states:

> "The award of the Coast Arbitrator, the award of the Area Arbitrator, as well as the decisions rendered throughout all stages of the grievance machinery were and are in complete accordance with the terms of the collective bargaining agreement between employer and union, 'Pacific Coast

Longshore Agreement, 1961-1966', particularly the terms governing the grievance-arbitration procedure.

"Each award and decision, 'reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is.' Humphrey v. Moore, 375 U.S. 335, 351 (1964) relying upon Drivers Union v. Riss & Co., 372 U.S. 517, 519 (1963)."

Finding 18 K provides:

"Local 13 has asserted that the ILWU acted arbitrarily, discriminatorily and in bad faith in processing the Velasquez grievance. More specifically, it contends that this conclusion is warranted on the basis of the following factual claims which the Court, taking all facts in the light most favorable to plaintiff and for the purpose of ruling upon the motion for summary judgment, assumes to be and finds to be true:

* * *

"K. That the award manifestly disregards the collective bargaining agreement and the law."

Finding 18K is in no sense a finding that the Kagel award was contrary to the provisions of the agreement specifically referred to in Conclusion II. At most it is a statement that an assumption is being made, to-wit: that the award manifestly disregards some aspects of the collective bargaining agreement and some aspects of the law. The reason for this assumption as to the agreement is explained in Conclusion IV K, where the court states (C.T. 636):

"It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not review the merits of any controversy so decided. . . . Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator."

The other findings made by the arbitrator, to which no exception has been taken by Local 13 (Op. Br. 27-33), fully support the conclusion that the award was "reached after proceedings adequate under the agreement". Accordingly, as in *Humphrey v. Moore,* 375 U.S. 335, 351 (1964) and *Drivers Union v. Riss &*

Co., 372 U.S. 517, 519 (1963), the court below properly held that this award was final and binding, "just as the contract says it is". Under these circumstances, the court's action based on 18 K is merely its correct refusal to substitute its decision as to the meaning of the contract for that reached by the arbitrator.[7]

Local 13 has claimed that there was manifest disregard for the law because the meaning of the contract is a question of law and § 17.81 as interpreted by the arbitrator is in violation of the law (C. T. 505-513) or is a flagrant violation of law (Op. Br. 50-51). In its response to the proposed findings and conclusions submitted by ILWU and PMA, particular reference is made to the National Labor Relations Act's unfair labor practice provisions (C.T. 476-477; 481-497). This claim is restated in the brief before this Court where Local 13 states (Op. Br. 80):

> "Had the parties expressed terms of the collective bargaining agreement including the officers in the provisions of Section 17.81... the provisions would have been violative of the Labor Management Relations Act and therefore unenforceable and subject to being terminated...."

In short, Local 13 asserts that to include union officials within § 17.81 "would result in injustice, absurdity and manifest disregard for the law" (cf. Op. Br. 94) and explains this contention at length by asserting that the arbitrator manifestly disregarded the

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7. Local 13 mistakenly relies on *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Union,* 359 F.2d 598 (2 Cir. 1966), for the proposition that in § 301 cases courts have the power to, and should, overrule the interpretation placed on the contract by the Coast Arbitrator, the ILWU and the PMA. That case involved a claim that arose under § 303 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 187). It was in no way based on an alleged breach of a collective bargaining agreement and so did not involve § 301. The holding of the court was that the employer was not precluded by the arbitration clause in its collective bargaining agreement from asserting in district court a claim of tort damages based on the alleged secondary activity of the union (see 359 F.2d at 600).

provisions of the National Labor Relations Act defining unfair labor practices (see Op. Br. 49-68; 72-74). The court below properly concluded, in this regard, that neither the arbitrator nor the courts will exercise the Labor Board's exclusive jurisdiction as to unfair labor practice claims (see V, infra).

The best indication of what Local 13 means by its many repeated references to "manifest disregard of . . . the law" and what the court meant in finding 18K is found in Local 13's references to such cases as *Wilko v. Swan,* 346 U.S. 427 (1953). Local 13 states (Op. Br. 50) that *Wilko* held "that a manifest disregard for the law is . . . a ground for setting an award aside" by judicial action. The lower court disposes of this argument in Conclusion IV K on the basis that the Supreme Court has specifically held the holdings of such cases to be "irrelevant" to judicial consideration of arbitration awards under collective bargaining contracts. See *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 at 578 (1960), quoted at page 19, supra. The district court, by its findings 18 K and its Conclusion IV K, has simply held that *Warrior & Gulf,* and not *Wilko,* is controlling in the instant case.

V. The jurisdiction of the district court to consider the claim that the PCLA or the awards violate the Labor Management Relations Act, 1947, as amended is pre-empted by the jurisdiction of the National Labor Relations Board.

Local 13 in its Points D-1, D-2, D-3, E and F asserts that the district court erred on the ground that the contract is unlawful under the National Labor Relations Act because it permits a union's business agent to be discharged from his job in the bargaining unit for violating the contract while working as a business agent and that the award is unlawful because it deregistered Pete Velasquez for his contract violations while working as a business agent. Local 13 refers to the unfair labor practice provisions of this Act.

The NLRB has primary jurisdiction to hear all charges that assert, even arguably, unfair labor practices as defined in §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. The statutory jurisdiction of the Board is exclusive and pre-empting. The leading case defining this doctrine of pre-emption is *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244-245 (1959). The *Garmon* rule has been applied consistently by the United States Supreme Court. *Plumbers, Steamfitters, etc. v. County of Door,* 359 U.S. 354 (1959); *Marine Engineers Beneficial Association v. Interlake S.S. Co.,* 370 U.S. 173, 174, 176-177 (1962); *International Association of Bridge, etc. Workers v. Perko,* 373 U.S. 701, 706 (1963); *Hattiesburg Building & Trades Council v. Broome,* 377 U.S. 126, 127 (1964).

The Supreme Court in *San Diego Building Trades Council v. Garmon,* supra, 359 U.S. 236, 240-243 (1959), discusses at length the expertise of the Labor Board and its exclusive jurisdiction. It then quotes from *Garner v. Teamsters, C & H Local Union,* 346 U.S. 485, 490-491 (1963), on the role of the Labor Board in administering the National Labor Relations Act:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . ."

The assertions of unfair labor practice are patent. In the proposed pretrial order Local 13 contended the following:

> "5. That by reason of the foregoing deregistration, Pete Velasquez was further deprived of his pension, welfare, mechanization and severance rights; that the deregistration against Pete Velasquez was for alleged activities while he was a Union official and contrary to the National Labor Policy. (C.T. 306: 24-28)
>
> "6. That the aforesaid deregistration had the effect and purpose of interfering with and restraining plaintiff and its members in their right of self-organization and to bargain collectively through representatives of their own choosing or engage in other concerted activities for their mutual aid and benefit and was contrary to the National Labor Policy. (C.T. 306: 29-307:2)
>
> "7. That the award deregistering Pete Velasquez had the purpose and effect of modifying and changing the Pacific Coast Longshore Agreement contrary to the National Labor Policy. (C.T. 307: 3-5)
>
> * * *
>
> "25. That the awards or decisions of the Coast and Area Arbitrator were against the National Labor Policy and contrary to the provisions of the National Labor Relations Act. (C.T. 308: 24-26)
>
> * * *
>
> "31. That prior lockouts of Local 13 members by the PMA had a coercive effect upon Local 13 and upon any agreement entered into by or between Local 13 and the PMA on December 8, 1964, or subsequent in respect to the arbitration proceeding appealed from and the motion to deregister Pete Velasquez. (C.T. 309: 14-18)
>
> * * *
>
> "45. The manner in which Pete Velasquez and Local 13 has been damaged by the Arbitration Award and the deregistration and how it has hampered and impaired plaintiff from operating as a labor organization." (C.T. 311: 3-6)

These are the same claims being raised before this Court. Contentions number 5, 6, 25 and 45 claim that the awards and the

resulting deregistration violate the National Labor Relations Act. In its contention 7 Local 13 claimed that the collective bargaining contract between PMA and the ILWU violates the National Labor Relations Act. Finally, in its contention 31 Local 13 claimed that other unrelated conduct of PMA violates the National Labor Relations Act. Hence, without regard to the substantive merit of these claims, it is clear under the principles announced in the *Garmon* line of cases that the district court did not err in failing to consider the claims made in Local 13's contentions of fact, numbers 5, 6, 7, 31 and 45.[8]

If the court did have jurisdiction and if it followed the decision of the National Labor Relations Board it would conclude that such a deregistration was not an unfair labor practice. It is conceded that the deregistration was based in part on incidents that occurred while Velasquez was acting as union business agent. Whether those incidents amounted to contract violations was an issue within the exclusive jurisdiction of the arbitrator. He held that they were violations. If the court could hear the issue at all it would be whether it is an unfair labor practice to deregister a registered longshoreman who repeatedly violated the collective bargaining contract where such violation occurred in part while the registered longshoreman was acting as union business agent. The NLRB has held that such a deregistration would be lawful.

In *Crucible Steel Castings Company,* 101 N.L.R.B. 494, the Board said at p. 495:

> "Flagg was the shop chairman, authorized to present grievances at the second stage of the grievance procedure set forth in the collective bargaining contract with the Respondent. Flagg had persisted, however, on numerous occasions in

8. These contentions do not raise issues for the court under *Smith v. Evening News,* 371 U.S. 195 (1962). There is no element of contract violation theory in any of these claims. Accordingly, they do not fall within the *Smith v. Evening News* doctrine as to § 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185.

> handling grievances in a manner contrary to the contract provisions as well as in violation of posted shop rules, and had been repeatedly criticized and warned by his foreman for such infractions. On the day of his discharge he had injected himself into the processing of a grievance prematurely, and was outside his department in violation of shop rules. Although twice instructed by his foreman to return to his department and to his work, he refused and was discharged. In view of Flagg's violation of shop rules, his refusal to comply with his foreman's direction to return to work, and, particularly, his persistence in disregarding the provisions in the contract for handling grievances, we find that Flagg's discharge was not in violation of Section 8(a)(3) and (1) of the Act. We shall therefore dismiss the complaint." (101 N.L.R.B. at 495)

Velasquez engaged in conduct similar to that of Flagg. He engaged in illegal work stoppages in disregard of the contractual grievance procedure. Deregistration was lawful.

Local 13 asserts in its opening brief that the arbitrators' decisions have the effect of depriving Local 13 membership to officials of its own choosing (Op. br. 62). This argument is based on the fact that the Local 13 Constitution states that only an "active longshoreman in the industry" may run for office in Local 13. (Op. br. p. 5-6) Apparently Local 13 interprets its constitution as requiring registration status under the contract as the proof of being an "active longshoreman" eligible for union office.[9] Under this view each deregistration decreases the number of "active longshoremen" and thereby decreases the number of persons eligible to run for office. Were the Court to adopt Local 13's argument then no deregistration would be lawful. Putting the proposition into

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9. Local 13 has voluntarily limited its representatives to those with registration status. Its rules, not the arbitration award, deprives it of the use of Pete Velasquez as an official.

ordinary industrial terms, it would always be illegal to discharge any longshoreman.[10]

VI. The complaints against Velasquez were arbitrable under the grievance-arbitration procedure of the Pacific Coast Longshore Agreement.

Local 13 contends in its Points C, H-2 and J that the district court erred in refusing to hold that the grievances involving conduct of an individual while acting as a union business agent were not arbitrable. Local 13 points out, correctly, that several of the grievances against Pete Velasquez involved incidents that occurred while he was serving as union business agent. It claims that this fact makes those disputes not arbitrable. In support of this position Local 13 advances two arguments.

First, Local 13 argues that because Velasquez was not employed under the Pacific Coast Longshore Agreement during the time he was acting as a union official there is no basis for an action against him under that agreement for conduct during that period. This argument ignores the fact that during the entire time Velasquez was acting as a union business agent he retained his contractual registration status (C.T. 613: 17-22). He held his job as a longshoreman because he held this status. *Matson Terminals, Inc. v. Cal. Emp. Com.,* 24 Cal. 2d 695 (1944). It was this contractual employment status that he lost in the grievance procedure. The arbitrator did not remove Velasquez from

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10. The foregoing answers Local 13's contentions that courts should determine whether unfair labor practices have occurred. Local 13's brief generally does not refer to unfair labor practices in violation of the National Labor Relations Act, but rather it refers to violations of the Labor Management Relations Act in general terms. Its brief indicates that Local 13 relies on the unfair labor practice sections, §§ 7 and 8, 29 U.S.C. §§ 157 and 158, found on the National Labor Relations Act, 29 U.S.C. §§ 151, et seq. This act is a portion of the Labor Management Relations Act, 29 U.S.C. §§ 141, et seq. Local 13 relies on only § 301(b), 29 U.S.C. § 185(b), of the remainder of the Labor Management Relations Act. (See Op. Br. 49-72.) Its argument based on § 301(b) is answered in part IV of this brief.

his union employment for his violations of the contract. The arbitrator ordered Velasquez discharged from his PMA employment because he had caused repeated illegal work stoppages in violation of the contract.

Second, Local 13 also argues that the question of arbitrability is for the courts to decide and that in this case the district courts should have ruled that the disputes involving Pete Velasquez were not arbitrable because of the narrowness of the arbitration clause of the Pacific Coast Longshore Agreement. The question of arbitrability is ultimately for the court but in this case that court function is fulfilled by merely noting the very broad scope of the grievance arbitration provisions. The lowest level of the procedure has jurisdiction "To investigate and adjudicate all grievances and disputes according to the procedure outlined in this Section 17." (17.124) Further "In the event that the Employer and Union members of any Joint Port Labor Relations Committee shall fail to agree upon any question before it, such question shall be immediately referred at the request of either party to the appropriate Joint Area Labor Relations Committee for decision." (17.24) Similarly any matter not resolved by the Joint Area Labor Relations Committee may be referred by either party to the Area Arbitrator. Decisions of the Area Arbitrator claimed by either party to conflict with the agreement may be referred to the Joint Coast Labor Relations Committee (17.261). Section 17.27 provides:

> "In the event that the Employer and Union members of the Joint Coast Labor Relations Committee fail to agree on any question before it, including a question as to whether the issue was properly before the Coast Labor Relations Committee, such question shall be immediately referred at the request of either party to the Coast Arbitrator for hearing and decision, and the decision of the Coast Arbitrator shall be final and conclusive."

The nature of the grievance-arbitration procedure is further shown in § 17.53 which provides: "The arbitrators shall have power to pass upon any and all objections to their jurisdiction."

In the foregoing provisions the parties to the agreement, the ILWU and PMA, have shown a clear intent to process all disputes through the grievance-arbitration procedure.

The contention that Local 13 did not specifically agree to arbitrate eight of the issues before the Area Arbitrator is not relevant. ILWU, not Local 13, is the exclusive representative for collective bargaining purposes. ILWU agreed to arbitrate these issues when it entered into the collective bargaining contract. Furthermore, the Joint Coast Committee minutes relating to the Velasquez grievance state, "The Coast Committee agrees the matter is before the Coast Committee on the ten rulings of violation of Section 17." (C.T. 670). ILWU thereafter appeared before the Coast Arbitrator regarding the conduct of Velasquez and the penalty applicable under the contract. It is clear that ILWU and PMA "did agree to give the arbitrator power to make the award he made".[11]

There is a further reason why Local 13's case is without merit in this area. In the present proceeding officials of Local 13 objected to the arbitrator's jurisdiction at the area level. This raised an arbitrable question under § 17.53. The area arbitrator ruled that he did have jurisdiction (C.T. 614:31-32). Officials of Local 13 refused to participate in the arbitration (C.T. 614:25-29). Officials of Local 13 referred the ruling of the area arbitrator on the merits to the Joint Coast Labor Relations Committee (C.T. 615:9-10). The issue of jurisdiction of the area arbitrator was not raised at either of the upper two levels (C.T. 615:1-2). The claim that the area arbirtator did not have jurisdiction has been waived or in the alternative is not ripe for determination by the court because the grievance procedure has not been exhausted. *Woody v. Sterling Aluminum Products, Inc.*, 365 F.2d 448 (1966).

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11. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), where the Court stated:

> "[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."

VII. The arbitration awards are not an improper modification of the PCLA.

Local 13 asserts that the position of the ILWU and PMA that § 17.81 applies to business agents is a modification of the contract and as such is invalid because it is not in accordance with the contractual procedures for modification and not in accordance with § 8d of the National Labor Relations Act as amended.

Even if the interpretation of § 17.81 agreed to by the ILWU and PMA were a modification of the contract the provisions of § 8d of the NLRA as amended would have no bearing. That section does not forbid contract modification consented to by the exclusive bargaining representative and the employer. The section defines the duty to bargain in good faith, the breach of which is an unfair labor practice. Furthermore, this section deals solely with bargaining in good faith at the end of the contract term. Thus, it is clear the § 8d is inapplicable as a matter of substantive law, as well as being within the exclusive jurisdiction of the Labor Board and so not properly to be considered by the district court in any § 301 action that could be brought if we assume there was a modification of the contract.

The interpretation of § 17.81 was not a modification of the contract. The contract always had that meaning. At the arbitration at the coast level Mr. Fairley, the Union spokesman, stated that "The legal question is whether officers of the Union are covered by the provision of the Contract and can be held for purported violation of the Contract. . . ."

"We are not contesting the first point, the legal point. It seems to us to be true that the Contract read as a whole is not subject to any other interpretation than the one given by the Employer." (Exhibit 7 to Local 13's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.)[12]

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12. "In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." (*Vaca v. Sipes,* 386 U.S. 171 at 194 (1967).)

Because the interpretation of § 17.81 was not a modification of the agreement and because the arbitrator acted on the basis of his interpretation of the contract (C. T. 675; See *supra,* p. 5), the modification provision is not applicable.

VIII. The arbitration awards are not an assessment of damages against an individual.

Local 13 contends in its Point D-4 that the arbitration awards violated § 301 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185) because the awards assessed damages against a union official. That section has no application to the awards here because neither award is a "money judgment" under the Act. Local 13 argues that if illegal work stoppages occurred "the union was liable" (Op. br. p. 70), and deregistering Velasquez placed the union's liability upon him as an individual and will deprive him of future earnings and benefits which is the same as assessing damages against him.

Section 301 provides in part: "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets and shall not be enforceable against any individual member or his assets." The section applies not only to union officials but also to union members. Under Local 13's theory it would be illegal to discharge a union member employe because to do so would always deprive that person of future earnings and thus be an assessment of damages against him. Simply stated there was no money judgment.

IX. Finding No. 19 is in accordance with law and is supported by the evidence.

Local 13 in its Point Q argues that the district court's Finding No. 19 is contrary to law and not supported by the evidence. Finding No. 19 is not contrary to law and is fully supported by evidence. Finding No. 19 provides:

"The allegations contained in Local 13's amended complaint, to the extent that they are inconsistent with the Findings of Fact herein are untrue."

We submit that the issues raised in this point are repetitious and are covered above.

X. Local 13's amended complaint fails to state a cause of action upon which relief can be granted.

Local 13 argues in its Point N that the district court erred in Conclusion V, which states that the amended complaint failed to state a cause of action upon which relief could be granted. The record before the district court clearly shows that the amended complaint did so fail. The record shows that Local 13 failed to plead and prove the elements of its case.

The premises are simple. The district court correctly held that one necessary element was breach of the duty of fair representation on the part of the ILWU. The district court correctly found that if all of Local 13's factual material were true, it would not establish a breach of the duty of fair representation. This finding requires the conclusion that the amended complaint does not state a claim upon which relief may be granted. The district court did not err in so holding.

XI. Summary judgment denying relief to Local 13 and confirming arbitration award of June 29, 1965 was proper.

Local 13, in Points M and O urges that the district court erred in granting summary judgment in favor of PMA and ILWU, which denied any relief to Local 13, because they did not adduce any factual material in support of their motion for summary judgment. For such support, ILWU and PMA relied upon answers to interrogatories, requests for admissions, affidavits submitted by Local 13, and the other material in the record. They found sufficient competent matter in the material submitted by Local 13. No conflicting factual material was presented to the district court. The court looked at the factual material submitted

by Local 13 in the light most favorable to it, by assuming it to be true in all respects. Thereupon it used discretion only in evaluating the facts in relation to the applicable law. The record shows that ILWU and PMA fully met the burden showing that Local 13's petition to set aside the award of the arbitrator was without merit, simply on the basis of the factual contentions presented by Local 13.

The elements that must be shown to confirm an arbitration award are the existence of an agreement to arbitrate, the holding of the contemplated arbitration and the issuance of an award by the arbitrator. (See e.g. Calif. Code of Civ. Proc. § 1285.4.) These facts have been stipulated to by the parties. The agreement to arbitrate is contained in § 17 of the PCLA. The arbitration was held on April 28, 1965. An award was issued on June 29, 1965.

Local 13 has interposed certain defenses. Those defenses are held to be without merit. Accordingly, summary judgment confirming the awards is proper.

CONCLUSION

Local 13 has sought to attack the contract negotiated by the exclusive bargaining representative of longshoremen, the ILWU. It has also sought to set aside the result reached in the grievance-arbitration process in which the exclusive bargaining representative, the ILWU, acted on behalf of the union and the employe. To prevail on either score, Local 13 must plead and prove that the ILWU acted in bad faith or in breach of its duty of fair representation. Local 13 has failed to submit any evidence that would prove such wrongful conduct by the ILWU. Accordingly, the district court did not err in granting its summary judgment refusing to vacate the arbitration awards. In turn, in the absence of any valid ground for setting aside the award, the district court

correctly granted its summary judgment confirming and enforcing the Opinion and Decision of Sam Kagel dated June 29, 1965.

We respectfully ask that the judgment of the district court be affirmed.

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Appendix

Excerpts from Conclusion IV of the district court.*

(C.T. 624-638)

278 F.Supp. 755, 767-773

In taking up each of the factual claims which the Court has assumed to be and found to be true in Finding of Fact 18 above, the Court concludes as follows:†

A. *The ILWU did not breach its duty of fair representation by its acts in selecting the arbitrators.*

Plaintiff asserts a *Humphrey* discrimination on the ground that Germain Bulcke, the Area Arbitrator, and Sam Kagel, the Coast Arbitrator, were selected as arbitrators by the presidents of PMA and the ILWU, J. Paul St. Sure and Harry Bridges respectively. While Local 13 did participate in selecting the area arbitrator prior to 1960, this authority was withdrawn by Section 17.51 of the contract which provides that the designation of arbitrators thereafter is to be made by the parties to the agreement, PMA and the ILWU.

This method of selecting the arbitrators is not attacked. Instead, plaintiff asks this court to substitute its judgment regarding the qualifications of the arbitrators for the judgment of the parties who have agreed to submit their disputes to those particular arbitrators. Clearly the Court should not do this. See *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

In any event the record demonstrates that the arbitrators are eminently well qualified. The admissions in the pretrial confer-

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* Substantial portions of the Conclusion have been omitted, as indicated. Also some minor changes have been made in the Conclusion as filed, such as punctuation, tense, omission of footnotes, use of italics and words in conformity to the brief, and insertion of some record references.

† The district court stated, C.T. 619:4-7:

"The following Conclusions of Law, insofar as they may be concluded Findings of Fact, are so found by this Court to be true in all respects. From the foregoing facts, the Court concludes that:"

ence order show that Germain Bulcke became area arbitrator for Southern California in 1960 (C.T. 303: 1-5) and that during the period Germain Bulcke has served as area arbitrator he rendered awards in a substantial number of controversies. (C.T. 303: 15-17) They further show that during and after the Velasquez controversy Local 13 has not sought to disqualify Bulcke from further service as area arbitrator. Admitted facts Nos. 26, 27 and 28 (C.T. 303: 1-14) in the pretrial conference order indicate that Germain Bulcke had a long history of experience in the stevedoring industry on the Pacific Coast, including working as a longshoreman and administering the collective bargaining contracts as an officer of Local 10 and as vice president of the ILWU. The fact that Germain Bulcke was eminently well qualified to consider and resolve disputes arising out of the Pacific Coast Longshore Agreement in no fashion shows a lack of fair representation of Pete Velasquez or Local 13 by the ILWU.

Similarly, Local 13 is attacking the appointment of Sam Kagel as Coast Arbitrator. The court may take judicial notice of the significant facts. Local 13 does not assert that these facts are untrue. He is a full professor at the school of law at the University of California at Berkeley (Boalt Hall) and a noted writer in the field of arbitration law. Professor Kagel served on the California Law Revision Commission that drafted the Arbitration Act that was enacted by the California State Legislature and codified in Civil Code of Procedure, Section 1280, et seq. Professor Kagel has served as arbitrator in numerous labor disputes arising in a wide variety of industries including the recent dispute involving the agricultural workers in the central California valleys. Admissions 31, 32 and 33 (C.T. 303: 21-30) indicate that Professor Kagel has rendered a number of decisions in disputes arising under the PCLA and that Local 13 has not sought to disqualify Sam Kagel from further service as Coast Arbitrator. Clearly the ILWU did not breach its duty of fair representation

by participating in the selection of Professor Kagel as the final arbitrator in labor disputes arising in the stevedoring industry on the Pacific Coast of the United States.

It should be noted that Local 13 concedes that it failed to initiate steps to disqualify Bulcke as an arbitrator following his decision to deregister Velasquez (C.T. 303: 18-20). In view of the fact that Bulcke was appointed in 1960 pursuant to the 1960 revisions in the grievance procedure and had participated in the resolution of numerous disputes from the time of his appointment until September, 1966, Local 13's familiarity with Bulcke and the manner in which he discharged his appointed duties compel the observation and conclusion that objections to Bulcke, as well as to Kagel, if Local 13 had any, should have been made at a time earlier than in these proceedings. Under such circumstances, neither the method of appointing arbitrators nor the change in the manner of their appointment can imply a *Humphrey* discrimination in the union's representation of Velasquez's grievance.

As a further basis for suggesting that the ILWU breached its duty of fair representation, Local 13 charges that the arbitrators in this instance were personally known to the presidents of PMA and the ILWU. The court must reject such an argument in view of the reasons set forth in *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960). Recognizing that a labor arbitrator's source of law includes the practices of the industry and the shop—the industrial common law—as well as the express provisions of the collective bargaining agreement, the Supreme Court observed that an arbitrator is usually chosen on the basis of the parties' confidence in his familiarity with the problems inherent in the particular industry in the process of industrial self-government, and because of their expectation that his resolution of a particular grievance will reflect factors other than those expressly set out in the contract. Contrary to the allegations advanced by Local 13, *Warrior and Gulf* suggests that it

is unrealistic to expect that parties to a collective bargaining contract would surrender the arbitration responsibilities to persons with whom they are not aquainted.

B. *The ILWU did not breach its duty of fair representation by referring to Velasquez as "Mickey Mouse" and by offering to handle "extended shift" problems at the Coast or San Francisco level rather than the local level.*

Local 13 charges that Mr. Bill Ward, an officer of the ILWU, had a telephone conversation with Mr. Curt Johnston, then the president of Local 13, in November, 1964. Ward's inquiry about "Mickey Mouse", a common nickname for Velasquez, prompted a discussion of the issue of working extended shifts in view of Velasquez's association with this problem as a union officer and as a working longshoreman. Johnston commented that the problem still existed, and Ward responded that the ILWU would handle that situation as well as "the mouse" at its San Francisco office. It is difficult to conclude that anything short of a distorted interpretation of this conversation would tend to establish that the ILWU officer's comments amounted to hostility toward one of its members or other breach of the duty of fair representation.

C. *The ILWU did not breach its duty of fair representation by having its president attend or not attend local labor relations committee meetings.*

Local 13 has suggested that the ILWU breached its duty of fair representation because the president of PMA and the president of the ILWU did not customarily attend local labor relations committee meetings in Southern California but did attend the one on December 8, 1964, involving Velasquez's work stoppage on the S.S. President Quezon.

The organization and operation of the grievance procedure is set out in § 17 of the PCLA. It provides for numerous first

step port grievance solving committees and for four area grievance solving committees. It is readily apparent that the president of the ILWU and the president of PMA could not and should not participate on a routine basis in the operation of these local committees. On the other hand, at critical times when large issues are at stake, one would ordinarily expect the chief executive officers of these organizations to interest themselves personally in local issues. The fact that the ILWU used its top official to represent Local 13 or Pete Velasquez in handling a grievance in no way implies that the ILWU breached its duty of fair representation in handling that grievance.

In view of the contract's coverage of longshore work in California, Oregon and Washington, it would be unrealistic to expect these officers to participate in the meetings of local committees on a routine basis. The attendance of the chief executive officers of these organizations at the meeting that considered the charges against Velasquez, conducted after a work stoppage in which Velasquez, as a working longshoreman, refused to comply with an Area Arbitrator's on-the-job interim award, clearly indicates that they considered the grievance to be of particular importance. This Court is unable to draw any conclusion from the ILWU president's personal participation in the proceedings other than one indicating an interest in discharging his union's responsibility toward those within the bargaining unit.

D. *The ILWU did not breach its duty of fair representation in evaluating PMA's proposals regarding the procedural handling of the Velasquez complaints.*

Local 13 asserts that Paul St. Sure, president of PMA made certain proposals regarding the procedural handling of the Velasquez complaints. Local 13 further asserts that the ILWU breached its duty of fair representation because it stated to Local 13 and officers of Local 13 at that time in a private caucus that Mr. St. Sure was a determined man when he had taken a hard and fast

position. Quite obviously Mr. Bridges' evaluation of Mr. St. Sure, a man with whom he had frequent dealings for over twelve years, could hardly be said to be a breach of the ILWU's duty of fair representation.

E. *The ILWU did not breach its duty of fair representation by reason of the telephone conversation between Curt Johnston and Germain Bulcke on January 4, 1965.*

Local 13 asserts the impropriety of a lengthy telephone conversation between Bulcke, the Area Arbitrator, and Curt Johnston, then the president of Local 13, at the conclusion of the first day of the arbitration hearing. More specifically, it complains that, in encouraging Local 13 to continue with the arbitration and present a case in defense of Velasquez, Bulcke stated, "We know Pete Velasquez is guilty and he is going to have to receive some kind of penalty." It is indeed difficult to conclude that these comments tend to demonstrate in any way that the ILWU breached its duty of fair representation or engaged in a *Humphrey* type discrimination. Such statements, which in effect urged Local 13 to present the best possible case in behalf of one of its members, compel the conclusion that the Arbitrator was urging that the Union make an honest effort to serve the interests of each of its members without hostility or discrimination in spite of the futility of such an undertaking.

F. *The ILWU did not breach its duty of fair representation because of the statement made by the president of the ILWU in April, 1965.*

Local 13 asserts that Velasquez and Harry Bridges, president of the ILWU, engaged in a conversation at an ILWU caucus in April, 1965, in which Bridges emphatically criticized Velasquez' conduct, stated that the probable outcome of the Coast Arbitration would be his deregistration, and commented that he was the only person who would be able to help Velasquez in

that event. In view of the Area Arbitrator's earlier finding that Velasquez was guilty of ten of the twelve charges presented, it is not at all surprising that Bridges was able to predict accurately that the Coast Arbitrator would order Velasquez' deregistration. The additional assertion that Bridges alone would be in a position to help Velasquez in the event that he was deregistered was no more than a statement of the realities of organized labor. Admittedly the statements and predictions by Bridges were sternly issued and to the point, but it is not unrealistic to expect such candor between the president of a union and one of its members. It is a complete distortion to construe the comments as hostile or intimidating so as to come within the scope of *Humphrey v. Moore,* supra.

* * *

G. *The ILWU did not breach its duty of fair representation by its handling of the "belly-packing" issue.*

Local 13 complains that the ILWU in effect "dumped" Velasquez' grievance in favor of another matter then in the grievance process. More specifically, it complains that the president of the ILWU made certain statements from which it could be inferred that the international union was more interested in a favorable disposition of the "belly-packing" problem than of the issue of subjecting a union official to deregistration for repeated contract violations.

But this Court is not prepared to find a breach of the collective bargaining agent's duty of fair representation in its support of the position of one group of employes contrary to the interests of an individual worker whom it also represents. In *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953) the Supreme Court found that the union had not breached its duty of fair representation in agreeing to an amendment of an existing collective bargaining contract, granting increased seniority to a particular group of

employees and resulting in layoffs which otherwise would not have occurred.

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id., at 338.

Conflicts between employees represented by the same union are to be expected, but to preclude the union from exercising its discretion in an instance such as this would only weaken the collective bargaining process and the grievance machinery. The record before this Court indicates that the ILWU, in acting to benefit the largest possible number of employees in the bargaining unit, made its election honestly, in good faith and without hostility or arbitrary discrimination. Accordingly, we are unable to conclude as a matter of law that the ILWU breached its duty of fair representation merely because it determined that a resolution of the "belly-packing" issue was more important to the bargaining unit than the Velasquez grievance.

There are no facts asserted, alleged or claimed that the choice was made by hostile or arbitrary discrimination or by dishonest or unfair motives or by any invidious, irrelevant or capricious action. In fact, the propriety of the ILWU's action, if it did what Local 13 says it did, is clear from Local 13's assertion that the choice in favor of the belly-packing issue was made because it involved more employees and was more important to the whole body of employees in the bargaining unit than the business agent issue.

H. *The ILWU did not breach its duty of fair representation by reason of the fact that PMA carefully considered its decision to press its complaints against Velasquez and seek his deregistration for violations while serving as a union business agent.*

Local 13 asserts that PMA's manager for the Southern California area commented that PMA's course of action—to pursue its complaints against Velasquez through the grievance procedure in an attempt to deregister him—was determined only after careful consideration. The short but effective answer to this line is that PMA was merely analyzing its labor relations policies, considering the effect of the implementation of those policies in this situation, and treating the Velasquez grievance as an important matter. The fact that PMA carefully considers its labor relation policies and the implementation of those policies in no way tends to show that the ILWU breached its duty of fair representation to Local 13 or Pete Velasquez.

I. *The ILWU did not breach its duty of fair representation by acquiescing in the Kagel arbitration.*

Local 13 contends that the Kagel award was "flagrantly against Union principles" so that the acquiescence in it by the ILWU, the ILWU caucus of longshore locals and Harry Bridges, was a breach of ILWU's duty of fair representation. . . . No court is in a position to say that it has the expertise to evaluate collective bargaining strategy and union principle better than Harry Bridges and the entire longshore caucus of the ILWU.

* * *

Plaintiff charges only that the ILWU is living up to its contract, for it provides that the arbitrator's award is final and binding in resolving disputes between the employees and the employers. To accept a "bad award", if it is assumed that the Kagel award is a "bad award", cannot be said to show hostile or arbitrary discrimination or dishonest or unfair motives or invid-

ious, irrelevant or capricious action."[A] breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious . . ." *Vaca v. Sipes,* supra, at 195. If anything can be inferred from an honorable acquiescence in the award of the Arbitrator, it is maturity in labor relations.

J. *The ILWU did not breach its duty of fair representation because of a conversation between Germain Bulcke and Professor Kagel after the Kagel award.*

Local 13 makes claims that the ILWU breached its duty of fair representation because Area Arbitrator Germain Bulcke talked to Coast Arbitrator Professor Sam Kagel after the decision of Kagel and stated that he, Germain Bulcke, was surprised at the severity of the penalty imposed by Professor Kagel. Local 13 further claims that Bulcke suggested that Kagel approach Bridges to see if Bridges would negotiate with St. Sure regarding reregistering Velasquez. These claims, if factual, have no relevance or materiality to the question of whether or not the ILWU breached its duty of fair representation of Local 13 or Pete Velasquez.

K. *The claim that the award is in manifest disregard of the collective bargaining agreement and the law does not raise any breach of ILWU's duty of fair representation.*

It is well settled that where the parties to a collective bargaining contract have agreed to submit their disputes to final and binding arbitration, courts will not review the merits of any controversy so decided. Particularly, the court will not rehear or reweigh the evidence offered at the arbitration hearing. Nor will the court substitute its interpretation of the collective bargaining contract for that of the arbitrator. These principles have been stated by the United States Supreme Court in *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960);

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

* * *

Clearly, the parties to the PCLA intended the grievance procedure with final and binding arbitration would be the exclusive method for resolving disputes arising under that agreement.

Moreover, this Court is compelled to conclude that Section 11 of the Agreement expressly states the parties' intention, including the ILWU and its locals, that there shall be no work stoppages for the life of the agreement and that, in the event of a grievance or dispute, the work shall continue in accordance with the Agreement. And, as we have already seen, the grievance procedure set forth in Section 17 of the Agreement is the exclusiv remedy for resolving all disputes or grievances.

In view of the strong public policy in favor of utilizing grievance procedures to resolve disputes as well as the express language in the Agreement forbidding strikes or work stoppages, the commitment made by the ILWU in acquiescing in the award disciplining Velasquez for initiating and participating in work stoppages is clearly within the permissible area of a bargaining representative's discretion. Moreover, Local 13 has been unable to produce or cite any authorities suggesting that it is improper for unions to enter into commitments preventing work stoppages or subjecting those who participate in such disruptive activities to disciplinary action.

Accordingly, and since the power of this Court to review the Arbitrator's award here at issue is limited by the rules enunciated in the cases cited above, we must conclude that plaintiff has not stated, alleged or claimed any facts whatsoever that would establish a cause of action for collateral attack upon the grievance procedure followed in this case and particularly upon the awards of the Coast Arbitrator and Area Arbitrator.

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